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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-6108

EMMA ARMOUR, *et al.*,

Appellants,

v.

JACK P. NIX, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM BY SCHOOL SYSTEMS OF CLAYTON COUNTY, COBB COUNTY, DOUGLAS COUNTY, GWINNETT COUNTY AND THE CITY OF MARIETTA

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MOTION TO AFFIRM

Appellees, boards of education from the counties of Clayton, Cobb, Douglas, and Gwinnett and the City of Marietta, Georgia, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court, dated September 24, 1979, as amended on October 29, 1979, be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This civil action was brought in 1972 as a class action by black residents of the City of Atlanta whose children attended City of Atlanta public schools and who claimed to desire interdistrict transfer of school children from outlying county and city school systems to the urban school system of the City of Atlanta. Defendants are six county boards of education, four city boards of education, and the State Board of Education. The counties involved are Clayton, Douglas, Fulton, DeKalb, Gwinnett and Cobb. The Defendant cities are Atlanta, located in Fulton and DeKalb Counties; Decatur, which is located in DeKalb County; Buford, located in Gwinnett County; and Marietta, located in Cobb County.

Looking at the area covered by the six counties on a map, one finds that, as the crow flies, it is 70 miles from southwest to northeast and approximately 50 miles in every other direction. Much of the area is densely populated and heavily congested with traffic. The area covered by the six counties involved in this suit is 1,925 square miles. This is an area which is approximately equal to the entire State of Delaware or the entire State of Rhode Island. As of the 1970 census, the combined population was 1,418,823. [3/2/78 Order, p.1][1]

The school systems submitting this brief are on the periphery of the Atlanta area. They are the school systems of Clayton County, Cobb County, Douglas County, Gwinnett County, and the City of Marietta (hereinafter referred to as "the outlying systems").

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[1] Findings by the district court shall be referenced herein in brackets, noting the date of the Orders—either interlocutory or final—and the page number.

The outlying systems were, pursuant to Fed. R. Civ. P. 41(b), dismissed from the case at the end of Plaintiffs' presentation of evidence because a battery of lawyers and others working on Plaintiffs' behalf for more than five years had simply failed to build a factual record that would allow, much less require, the district court to make the various specific factual determinations that, in light of *Milliken v. Bradley*, 418 U.S. 717 (1974) (hereinafter "*Milliken I*"), would be necessary to justify the extreme remedy of interdistrict relief. Although this was a proper three-judge district case,[2] the controversy on appeal is not truly jurisprudential or constitutional in nature—the controlling legal concepts are essentially undisputed. This appeal raises simply an insubstantial issue involving the weight of the evidence.

QUESTION PRESENTED

Whether or not the evidence submitted by Plaintiffs required a finding that any of the outlying systems involved, or any governmental bodies in metropolitan Atlanta, were guilty of conduct that has a present, significant, identifiable and quantifiable, segregative impact on any other school system.

ARGUMENT

Milliken I is, of course, the root case for the concept of interdistrict relief. It is recognized in that case that federal courts have the limited power to cross school district lines for desegregation purposes if circumstances warrant such a drastic remedy.

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[2] The argument presented in the motion to affirm or dismiss by Appellee State of Georgia is adopted herein by reference.

There are two constitutionally-borne competing interests recognized in *Milliken I* regarding the interdistrict remedy. One interest is, of course, to eliminate state mandated or deliberately maintained dual school systems. The trial court here found that all of the defendant school systems were unitary. The other interest is that of "local control over the educational process [which] affords citizens an opportunity to participate in decision making, permits the structuring of school programs to fit local needs and encourages 'experimentation, innovation, and a healty competition for educational exellence.' " *Milliken I*, 418 U.S. at 741. This interest is significant in this case due to the autonomy of the local school systems and their close relationships with their respective county and municipal governments.

In the balancing of these interests in the context of the interdistrict remedy, this Court stated:

> The controlling principal consistently expounded in our holdings is that the scope of the remedy is determined by the nature and the extent of the constitutional violation . . . [citation omitted]. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a crossdistrict remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. *Milliken I*, 418 U.S. at 744-745.

The interdistrict relief sought in this case would involve the massive transfer of thousands of children over hundreds of miles of heavily congested urban streets and interstate highways on a daily basis, and would also entail the dismantling and total restructuring of six local and autonomous county and city governmental bodies. The

scope of the remedy envisioned by Plaintiffs in this case could have been justified only by the most extreme showing of constitutional violations. And, yet, in this case, each and every school system involved, including the core system of the City of Atlanta, was found by the trial court, based on the Plaintiffs' evidence,[3] to be unitary or under an operating desegregation plan under the jurisdiction of the court prior to the commencement of this litigation. [3/2/28 Order, p.16; 9/24/79 Order, p.6]

The lower court specifically found at the close of Plaintiffs' evidence that there was no showing of "significant constitutional violations by *any* governmental body of the . . . [outlying counties and cities]." (Emphasis of the court.) [3/2/78 Order, p.25] It was also found that the Plaintiffs failed to present evidence of substantial constitutional violations with interdistrict impact. [3/2/78 Order, p.27]

The lower court noted specifically that the outlying systems were unitary at the time the suit was filed and held that "as long as the present existence or absence of constitutional violations is not ambiguous, the past history of racial segregation is not relevant to a consideration of . . . [the outlying counties'] motions to dismiss." [3/2/78 Order, p.16] This Court has held again and again that once a school system has achieved unitary status, without a showing that governmental bodies have deliberately attempted to manipulate demographic patterns to

[3] In the Jurisdictional Statement, Plaintiffs refer time and again to the trial court's comment on Page 14 in the March 2, 1978 Order that, "The evidence which has been amassed is truly staggering." It was the quantity, not the quality or credibility, of the evidence about which the court spoke, referring to over 1,000 multipage documents, most of which pre-dated the very existence of what is now a "metropolitanized" area surrounding Atlanta.

affect the racial composition of the schools, further intervention by federal courts should be unnecessary. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

There are several other significant findings by the trial court. First, insofar as Plaintiffs' housing theory is concerned, the court, recognizing that segregated housing patterns do exist in the City of Atlanta, found that the phenomenon exists today, not because of governmental actions, but because of personal preference, economic restraints, or reasons that can never be fully explained. [9/24/79 Order, p.19] The court further found that public education in Georgia is uniquely an integral part of local self-government. [9/24/79 Order, p.5] The educational system has been historically organized on a county basis with only a few independently-operated city school systems.

Perhaps one of the most significant findings of the trial court was that the urban school system of the City of Atlanta, where Plaintiffs' children once attended, has been declared by the courts to be unitary.[4] [9/24/79 Order, p.6]

In *Milliken I*, it was held that:

> Specifically it must be shown that racially discriminatory acts of the state or local school districts or of a single school district have been a substantial cause of interdistrict segregation. Thus, an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts

[4] Although the district court's adjudication of the Atlanta school case was unreported, it is a part of the record in this case and was affirmed by the United States Court of Appeals for the Fifth Circuit in *Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975).

> caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy. *Milliken I*, 418 U.S. at 745.

In *Milliken I*, it was found by the trial court, and, upheld by this Court, that there was evidence of *de jure* segregated conditions in the Detroit schools. There was no showing in that case, however, of any significant violation by the outlying schools and no evidence of any interdistrict violation or effect. Therefore, the interdistrict relief was denied. Here, not only were the outlying counties and cities found to be operating unitary school systems, but also the system of the City of Atlanta, whose racial composition Plaintiffs desire to alter by interdistrict transfers, was declared to be unitary. The facts in this case are further removed from *Milliken I's* interdistrict remedy requisites than the facts were in *Milliken I* itself.

The trial court here expressly found that "Plaintiffs have failed to show any constitutional violation by the State of Georgia or any of its subdivisions, including defendant school boards, which has had an interdistrict effect, so that the court would be justified in imposing an interdistrict remedy." [9/24/79 Order, p.33]

The only thing that Plaintiffs have been able to show in this case is that the unitary schools of some of the outlying systems have different racial compositions from their urban counterpart, the unitary system of the City of Atlanta.

As Mr. Justice Stewart observed, concurring in *Milliken I:*

> . . . Indeed, no evidence at all concerning the administration of schools outside the City of Detroit was presented other than the fact that these schools contained a higher proportion of white pupils than did the schools within the city. *Since the mere fact of different racial compositions in contiguous districts does not itself imply or constitute a violation of the Equal Protection Clause in the absence of a showing that such disparity was imposed, fostered, or encouraged by the State or its political subdivisions, it follows that no interdistrict violation was shown in this case.* 418 U.S. at 755-756 (Emphasis added).

The trial court was eminently correct in its ruling. In fact, Plaintiffs have not made any attack on the factual findings. Plaintiffs' appeal is aimed only at the trial court's application of the *Milliken I* standard to the facts of this case.

Plaintiffs' quarrel seems to be the lower court's unwillingness to pin liability on conduct so remote in time that it has no bearing on the current state of affairs in the City of Atlanta. The flaw in Plaintiffs' historical proof was that it did not show a present violation warranting interdistrict relief. The court expressly recognized [3/2/78 Order, p.15] the admonition in *Keyes v. School District No. 1,* 413 U.S. 189, 210-211 (1973) wherein this Court stated:

> We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make any of those actions any less "intentional." (Emphasis added).

Based on that admonition, the court considered the evidence and simply found against the Plaintiffs. Historical conduct alone is not enough to warrant the remedy sought by Plaintiffs in this case. The conduct must result in a present segregative condition. As noted above, and reemphasized here, the trial court correctly observed that once a school system has achieved unitary status, "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31-32 (1971). *See also, Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

The trial court correctly followed the holdings of this Court relating to school desegregation cases. *Milliken I* and its progeny were scrupulously adhered to. The trial court considered the evidence and the elements necessary for the findings of an interdistrict violation, including drawing or re-drawing of school district lines, transfer of school units between school systems, purposeful discriminatory use of state housing or zoning laws, and other considerations. The district court simply found that none of the requisite elements were present to justify federal interference with the autonomy of the local school systems in Georgia.

CONCLUSION

For the reasons stated above, we respectfully submit that the appellants present no substantial question for decision by this Court, and that the judgment and decree of the District Court should be affirmed.

Dated: April 21, 1980

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing MOTION TO AFFIRM BY SCHOOL SYSTEMS OF CLAYTON COUNTY, COBB COUNTY, DOUGLAS COUNTY, GWINNETT COUNTY AND THE CITY OF MARIETTA on counsel for Appellants by depositing same in the United States mail, with sufficient postage affixed thereto to insure delivery.

This ____ day of _____, 1980.

_____
Attorney at Law